Supreme Court, U.S.
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No.—— OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

HOLLY WHITE,
Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN, and LORI ANNE CHOZEN,
Respondents.

Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Oklahoma law deny petitioner equal protection and due process of law by erecting an insurmountable barrier to preclude petitioner, a child born out of wedlock, from establishing, for inheritance purposes, the paternity of her father simply because she had not obtained a judicial determination of paternity by the time he died when she was an infant of fifteen months, where there are now available sophisticated DNA tests that can establish paternity both quickly and definitively.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner Holly White ("Petitioner") seeks review of a decision of the Oklahoma Court of Civil Appeals holding that petitioner, a child born out of wedlock whose putative father died when she was less than two years old, has no standing or right to seek a determination of paternity for inheritance purposes after the death of the putative father, even though Petitioner had no real opportunity to establish paternity before the death of the putative father and even though reliable methods now exist to establish paternity posthumously.

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals is reported at 1999 Ok. Civ. App. 45, —— P.2d ——, and

reprinted at Pet. App. 1a. The order of the Oklahoma Supreme Court denying a writ of certiorari is unreported and is reprinted at Pet. App. 16a. The ruling of the District Court of Tulsa County is unreported and is reprinted at Pet. App. 12a.

JURISDICTION

The decision of Oklahoma Court of Civil Appeals was filed on January 12, 1999. A timely petition for a writ of certiorari filed with the Supreme Court of Oklahoma was denied on April 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> a. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The versions of Okla. Stat. tit. 84, § 215 in effect both before and after October 1, 1977 are reprinted at Pet. App. 21a-22a.

STATEMENT OF THE CASE

This case raises an important question about the continued viability of this Court's decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), where a closely divided Court

ruled that it did not violate the Fourteenth Amendment for a state to bar an illegitimate child from seeking to inherit from his father by intestate succession because he had failed, *during the lifetime of the father*, to obtain a judicial determination of paternity. The Oklahoma courts in this case applied *Lalli* to deny standing to petitioner to pursue her claims as a potential heir because her putative father had died when she was fifteen months old and she had not, prior to his death, obtained a judicial determination that he was her father. In so doing, they gave continued effect to a constitutional ruling of this Court that has been called into serious question (1) by a series of more recent decisions of this Court invalidating time limits for establishing paternity that were deemed to erect unjustifiably high barriers to the vindication of the rights of illegitimate children, and (2) by the development of DNA techniques for establishing paternity that render largely moot the concerns about disruption of probate proceedings that underlay the *Lalli* Court's constitutional analysis. In light of these factors, it is almost inconceivable that the Court would reach the same result today if it again addressed the constitutional issue presented in *Lalli*. Yet as this case illustrates, the *Lalli* decision continues to be applied to defeat inheritance claims of illegitimates, not only in Oklahoma but in other states as well. It is high time that the Court address this issue and bring its jurisprudence governing the inheritance rights of illegitimates into step with the rest of the related case law, as well as with what is now known about the ability of science to determine paternity definitively.

The Oklahoma Statutory Scheme

Prior to 1977, the Oklahoma intestacy statute, Okla. Stat. tit. 84, § 215, allowed "illegitimate" children to inherit by and through their fathers only if there was

1. Written acknowledgment by the putative father that he is, in fact the father of the child; *and*

2. The putative father and the mother married before the putative father's death and the father acknowledges the child as his. *See* Pet. App. 21a-22a.[1]

After this Court's decision in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Oklahoma Legislature recognized that this statute was unconstitutional, because it unduly limited the opportunities of an illegitimate child to proceed as a potential heir. *See Vincent v. Sutherland*, 691 P.2d 85, 87 n.2 (Okla. Ct. App. 1984). The legislature amended the statute to allow an illegitimate child to inherit by and through the father, if:

(a) [T]he father, in writing, . . . acknowledged himself to be the father;

(b) [T]he father and mother intermarried subsequent to the child's birth and, the father, after such marriage, acknowledged the child as his own or adopted him into his family;

(c) [T]he father publicly acknowledged such child as his own, receiving it as such with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or

(d) [T]*he father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.*

Pet. App. 21a (emphasis added).

In 1990, the Oklahoma Supreme Court in the case of *Estate of King*, 837 P.2d 463 (Okla. 1990), upheld the

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[1] Because these events did not occur before petitioner's father's death in 1960, she had no opportunity from 1960 to 1977 to do anything to preserve her rights as a potential heir.

constitutionality of the revised section 215. In so doing, it interpreted subsection (d) as requiring a judicial determination of paternity "before the death of the father." *Id.* at 467. As a result, the Oklahoma statutory scheme, as construed, still flatly bars any claim to inheritance where the claimant seeks to prove paternity for the first time after the putative father's death.

The Relevant Facts

Petitioner Holly White was born from a non-marital union in December 1959. Fifteen months later, her putative father, Jay Myers, died of leukemia. Although Holly's mother, Diane White, had notified and spoken with Myers regarding the pregnancy and Holly's birth, no formal acknowledgment of paternity had been made by the father. Pet. App. 17a-18a. Neither Holly nor her mother received any notice of the putative father's death.

In 1991, Holly learned the identity of her paternal grandmother, Gertrude Geller, formerly Myers. Petitioner is the only grandchild of Mrs. Geller through Jay Myers. Mrs. Geller had three grandchildren through a daughter. Upon learning about her grandmother, petitioner made contact with her, describing her claim to be the only child of Mrs. Geller's late son.

Proceedings Below

Mrs. Geller died in October, 1997. By obituary in a Tulsa, Oklahoma newspaper, Petitioner learned of Mrs. Geller's passing and filed a claim in the Geller probate proceedings to her father's share of the estate. The personal representative, joined by other beneficiaries of Mrs. Geller's estate, moved to dismiss petitioner's claims, arguing that she did not have standing under Oklahoma law to seek inheritance. Petitioner responded that if state law were so interpreted, it would violate her rights to due

process and equal protection under the Fourteenth Amendment.

After extensive briefing and oral argument before the probate court, the probate judge dismissed Holly's claims. Holly was declared to lack standing because she had not proven paternity before her father's death. The Court stated:

> I will sustain the motion to strike all of the White pleadings. She has no standing. She has *never* had standing under Oklahoma law. She does not have standing under Oklahoma law today.

Pet. App. 19a (emphasis added).

Holly appealed the trial court's decision to the Oklahoma Supreme Court. The Oklahoma Supreme Court assigned the appeal to the Oklahoma Court of Civil Appeals. On January 12, 1999, the Oklahoma Court of Civil Appeals issued its opinion affirming the probate court's ruling. In expressly rejecting petitioner's constitutional claims, the court relied upon *King, supra*, in which the Oklahoma Supreme Court in turn relied heavily, if not exclusively, upon *Lalli v. Lalli*, 439 U.S. 259 (1978). *See* Pet. App. 8a ("[I]n *King*, the supreme court specifically concluded that '[s]ection 215 of title 84 does not violate the Equal Protection Clause of the federal Constitution.' ") (citing 837 P.2d at 466); Pet. App. 10a ("The Oklahoma Supreme Court has determined that 84 O.S. 1991 § 215, in its present form, and with the 'special burdens' it imposes, is constitutional and protects the State's legitimate interest in the orderly disposition of estates."). Although petitioner had directed the court's attention to more recent case law of this Court dealing with statute of limitations governing paternity claims, the court did not address those cases.

Petitioner asked the Oklahoma Supreme Court to review the Court of Civil Appeals' decision. On April 6, 1999, that Petition for Writ of Certiorari was denied. Pet. App. 16a.

REASONS FOR GRANTING THE WRIT

This Court has long held that the equal protection clause does not permit the categorical exclusion of illegitimate children from the right to inherit by intestate succession from the fathers. *Trimble v. Gordon*, 430 U.S. at 770-71. Here, however, as a result of the application of Oklahoma law, Petitioner has never had a meaningful opportunity to establish paternity and thereby protect her intestacy rights. Under the law in effect when she was born and when her father died 15 months later, she had no right to pursue a claim. And when the statute was amended after *Trimble* in 1977 to allow putative heirs to make claims in intestacy proceedings based on judicial determinations of paternity, the law was construed to require a "before death" determination. That option was, of course, unavailable to petitioner, just as it is unavailable to many other children born out of wedlock in Oklahoma and the many other states that retain a rule requiring a judicial determination of paternity before a father's death, as a precondition to a later effort to claim inheritance in intestacy proceedings. *See* Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give his Opinion*, 35 B.C. L. Rev. 747, 753 (1994) ("Many states have long made it impossible for children to establish paternity after their fathers' deaths, especially for intestate inheritance purposes.") (citing examples); Eileen M. Teicher, *Out for Blood: Proving Paternity When Daddy's Dead*, 13 J. Juv. L. 80, 82 (1992) ("Only a few states recognize the illegitimate

child's right to assert a cause of action determining paternity after the putative father's death.") In those states that bar posthumous paternity claims, when a father happens to die relatively soon after the child is born, the failure of the *mother* to act quickly to obtain a determination of paternity will mean that the *child* is permanently barred from claiming inheritance.

In 1978, this Court in *Lalli v. Lalli* held that it is constitutionally permissible for a state to mandate that illegimate offspring forfeit their inheritance rights if they have not obtained a judicial determination of paternity prior to their fathers' deaths. 439 U.S. at 275-76. But the legal and factual underpinnings of that decision have been eroded to the point where the ruling is no longer supportable. It is time that the Court recognize that reality and overrule a decision that is still being used to defend unjustifiable forms of discrimination based on illegitimacy.

Turning first to the legal developments, in a series of cases dealing with statutes of limitations for paternity claims against living putative fathers, this Court invalidated a one-, a two- and a six-year statute on the ground that each bore an insufficient relation to any applicable and legitimate state interest. *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v. Brown*, 462 U.S. 1 (1983); *Clark v. Jeter*, 486 U.S. 456 (1988). These cases, in turn, have been applied by the Eleventh Circuit to bar application of a "proof during the lifetime" requirement (borrowed from state intestacy laws) to applicants for survivor benefits under the Social Security Act. *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992); *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983). *But see Campbell v. Apfel*, No. 96-35285, 1999 U.S. App. LEXIS 10041, at *11 (9th Cir. May 25, 1999) (applying *Lalli*) (upholding denial of survivor benefits where no determination of paternity had occurred before father died).

Second, as a factual matter, the chief concern that underlay the Court's ruling in *Lalli* is no longer applicable. That concern was the "particular problems of proof" involved in posthumous claims of paternity, which mean that "spurious claims may be difficult to expose" and that probate proceedings may accordingly be disrupted. 439 U.S. at 271. Given those problems of proof, the Court was willing to credit the states' assertion that "[a]ccuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father." *Id.* But with the arrival of DNA testing, there are now techniques available to prove, or disprove, paternity quickly and definitively, even after a father's death. *See Clark v. Jeter*, 486 U.S. at 465 (noting advent of "increasingly sophisticated tests for genetic markers [that] permit the exclusion of over 99% of those who might be accused of paternity"); Charles Nelson Le Ray, *supra*, 35 B.C. L. Rev. at 798 (noting that "highly accurate paternity testing is now possible even when the putative father is deceased"). It follows that the constitutional calculus must be reconsidered.

The courts below may have felt a legitimate concern about anticipating the demise of a precedent of this Court that has been called into question by recent developments but has never been overruled. But that is all the more reason why this Court should take the opportunity to overturn a decision that no longer makes sense. *Lalli* is an outlier in the law. Most if not all 50 states, prodded by Congress, now give children 18 or more years to establish paternity against living fathers obligated to pay child support. But a disturbing number of states still provide that children unfortunate enough to have their fathers die before they have established paternity have no rights in the subsequent intestate proceedings, and courts continue to apply *Lalli* to justify such a draconian rule. *See, e.g.*,

Estate of Sanders, 3 Cal. Rptr. 2d 536, 544-45 (Cal. Ct. App. 1992); *Estate of King*, 837 P.2d at 466. Moreover, those laws have an unfortunate spillover effect on eligibility for Social Security survivor's benefits, at least outside the Eleventh Circuit. *See, e.g., Campbell v. Apfel*, 1999 U.S. App. LEXIS 10041. A grant of review is therefore highly warranted.

I. THE COURT SHOULD GRANT REVIEW TO CONSIDER THE IMPACT OF MORE RECENT CASES ON *LALLI* AS A PRECEDENT.

In 1976, in *Trimble v. Gordon*, the Court for the first time extended constitutional protection to the inheritance rights of illegitimates. In so doing, it commented:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

430 U.S. at 769-70 (internal quotation marks and citation omitted).

A year later, in *Lalli*, the Court held by a 5-4 vote that it was permissible for a state to deny the right to inherit by intestate succession to those illegitimate children who failed to obtain a determination of paternity during the lives of their fathers. It has been over twenty years since that decision, and significant events have occurred in the interim. Three other decisions of this Court have held that state statutes did not provide an illegitimate child a

sufficient opportunity to establish a right to benefits otherwise granted to legitimate children and thus violated the equal protection clause. Those cases—*Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988)—all followed *Trimble* and relied on reasoning that is very hard to square with *Lalli*. In each case, the Court invalidated a statute of limitations that had the effect of barring a minor child from seeking child support against a living putative father.

The Court in *Mills, Pickett* and *Clark* applied intermediate scrutiny, assessing whether imposition of given limitations period on illegitimates seeking the same support guaranteed to legitimates was substantially related to the governmental interest in barring stale or fraudulent claims. In *Mills* the Court invalidated a one-year statute of limitations. The *Pickett* Court saw no greater state interest in enforcing a two-year limitation. Finally, in 1988, the Court in *Clark v. Jeter* held that Pennsylvania had no substantial interest in applying even a *six*-year statute. In so doing, it noted that the state (along with the rest of the states) had recently enacted an 18-year statute of limitations governing paternity claims against living fathers. 486 U.S. at 465. It also recognized that sophisticated genetic tests of paternity were now available. *Id.* The Court concluded that the state had no "substantial reason" to cut off at six years the time when a child could assert a claim of paternity. *Id.*

In this case, by contrast, Oklahoma has taken the position that petitioner's right to inherit by intestate succession was properly cut off when she was 15 months old because of the fortuity that her father happened to die. That position is, to say the least, in tension with the *Mills-Pickett-Clark* trilogy. If the Constitution does not allow a state to cut off paternity suits after six years, it

is hard to see how the same Constitution can allow extinguishment of rights of inheritance by intestate succession whenever a father happens to die—even one day after a birth.

The tension was recognized by the Eleventh Circuit in *Handley* and *Daniels*. There, the court was dealing with federal Social Security survivor benefits, which are awarded under a federal statute that incorporates state intestacy laws as a test of eligibility. *See generally Lawrence v. Chater*, 516 U.S. 163, 164 (1996) (*per curiam*). While expressly limiting its ruling to that statutory context, the Eleventh Circuit still called into serious question the continued viability of *Lalli* in the wake of the *Mills-Pickett-Clark* trilogy. In *Handley*, the putative father died when the claimant was four months old. The court of appeals held that application of the Alabama intestacy law, with its requirement of a determination of paternity prior to the death of the father, would create an unconstitutional insurmountable barrier. In *Daniels*, the child was two when the father died. The court relied on *Handley* to reject application of the Georgia intestacy statute as a test of eligibility for survivor benefits. The Eleventh Circuit concluded in its opinion:

> . . . We conclude that, as applied to the facts of this case, the Secretary's requirement that [the minor] establish paternity within two and one-half years violated [the minor's] right to equal protection of [the] law and that [the minor] is entitled to receive survivors benefits under the Social Security Act.

979 F.2d at 1522. It added:

> The subclass of illegitimate children who are conclusively denied benefits because of the "during the lifetime" requirement may be numerically small, but that does not make it less deserving of constitutional protection.

Id. (internal quotation marks and citation omitted).

But other courts continue to apply *Lalli* to cut off the rights of illegitimates. First, in state intestacy proceedings, some courts—like Oklahoma, *see Estate of King*, 837 P.2d at 466—continue to enforce the requirement that paternity have been judicially determined before the putative father's death. *See, e.g., Estate of Sanders*, 3 Cal. Rptr. 2d at 544-45; *Estate of Smith*, 685 So. 2d 1206, 1208 (Fla. 1996); *Estate of Erbe*, 457 N.W.2d 867, 869-70 (S.D. 1990).

Moreover, just last month, the Ninth Circuit applied *Lalli* to justify denial of Social Security survivor benefits to a claimant. *See Campbell v. Apfel*, 1999 U.S. App. LEXIS 10041. In that case, the claimant's putative father died when the claimant was five years old. *Id.* at *2. A state suit seeking child support had been filed, and DNA evidence showed a "98.14 percent probability" that the defendant was the father. *Id.* But because the issue of paternity had never been resolved in that state proceeding, the Ninth Circuit affirmed the denial of survivors benefits, based on a borrowed California intestacy law requiring a finding of paternity before the father's death. In so doing, it relied on *Lalli* as continuing to be good law. *Id.* at *11 ("Relying on *Lalli*, the state court properly held that, 'requiring a court order establishing paternity to be issued during the father's lifetime is substantially related to the state interest the statute was intended to promote.' ") (quoting *Sanders*, 3 Cal. Rptr. 2d at 545).

A grant of certiorari in this case would almost certainly have the additional benefit of resolving the current irreconcilable conflict between the Eleventh and Ninth circuits over the constitutionality of applying a requirement of a before-death paternity determination, borrowed

from a state law like Oklahoma's, to deny federal survivor benefits.[2]

II. THE COURT SHOULD GRANT REVIEW TO REASSESS *LALLI* IN LIGHT OF INTERVENING DEVELOPMENTS IN THE TECHNIQUES FOR DETERMINING PATERNITY.

Even if the law had not evolved since 1978, developments in scientific techniques used to determine paternity would warrant a full reassessment of *Lalli*. The primary basis for the *Lalli* Court's conclusion that states have a substantial interest in requiring paternity determinations during the life of the putative father was the "particular problems of proof" thought to arise when paternity claims are filed posthumously. 439 U.S. at 269. The Court accepted the state's assertion that allowing claimants to assert paternity for the first time in probate proceedings would be unduly disruptive and invite fraudulent and harassing claims. *Id.* But there is no reason to think that the Court, looking at the issue fresh in light of the DNA testing techniques now available, would come to the same conclusion.

The introduction of DNA testing in recent years provides a much more flexible and much more certain technique for determining paternity—and a technique that can be used even after the putative father has died. Unlike traditional blood tests, DNA tests can use any tissue samples that contain cellular material. Le Ray, *supra*,

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[2] The Court previously granted certiorari to resolve a closely related conflict between the Eleventh Circuit's rulings and the Fourth Circuit's position that the possible unconstitutionality of the state law borrowed by the Social Security Act was irrelevant as a basis to allow a claimant survivor benefits. *Lawrence v. Chater*, 516 U.S. at 164. That case, however, was remanded to the Fourth Circuit without a merits ruling, after the Government changed its position in this Court. *See id.* at 175.

at 764-65. Often, such samples are obtained through exhumation. *See id.* at 767 ("Some courts have ordered exhumations and the release of blood and tissue samples of the deceased so that DNA testing could be performed, noting that scientific advances have removed the problems of proof that long barred posthumous paternity actions.")[3] Moreover, even if such samples are unavailable, DNA from close relatives is often sufficient to reconstruct a person's DNA fingerprint. *Id.* at 765; *see Sudwischer v. Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991) (directing putative sibling to submit blood sample for use in verifying paternity of deceased).

For these reasons, the concerns about problems of proof that traditionally led states to bar paternity claims asserted after the putative father's death no longer apply. As one court has put it,

> The problems of proof which have been the basis of denying inheritance rights to illegitimate children have been removed by the advent of this new genetic testing. Therefore, this court can no longer be a participant in denying the opportunity to an illegitimate child to prove his paternity.

Alexander v. Alexander, 537 N.E.2d 1310, 1314 (Ohio Prob. Ct. 1988), *dismissed as moot*, 560 N.E.2d 1337

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[3] As one court, construing a statute much like Oklahoma's, commented:

> The exhumation or autopsy of a corpse, when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living. . . . The exhumation of a corpse, often a material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity.

Wawrykow v. Simonich, 653 A.2d 843, 846 (Pa. Super. Ct. 1994) (internal quotation marks and citation omitted).

(Ohio Ct. App. 1989). *See also Wawrykow v. Simonich*, 652 A.2d 843, 844 (Pa. Super. Ct. 1994) ("We find that *Trimble* and its progeny were preoccupied with a 'proof problem' that has been ameliorated by the advances made in the medical field with regard to blood testing.")

It further follows that the constitutional balance struck in *Lalli* must be reconsidered. The sole basis of the Court's ruling in *Lalli* was acceptance of the proposition that problems of proof in posthumous paternity cases were so severe that to allow them would be to invite disruption of the probate process, harassment of participants in that process, and fraud. 439 U.S. at 525-26.[4] Those state interests, however, are no longer substantial in a world where DNA testing can very often confirm or invalidate a paternity claim quickly and definitively.

This Court has previously suggested that where there are " 'lurking problems with respect to proof of paternity,' " those problems cannot be " 'lightly brushed aside.' " *Pickett v. Brown*, 462 U.S. at 9 (quoting *Gomez v. Perez*, 409 U.S. 535, 538 (1973)). But it went on to say that "those problems [cannot] be used to form "an impenetrable barrier that works to shield otherwise invidious discrimination.' " *Id.* (quoting *Gomez*, 409 U.S. at 538). That would be precisely the effect of leaving in place the *Lalli* rule that the Constitution permits the states to erect a flat bar to assertions of paternity claims in the intestacy proceedings after a putative father's death —based on supposed "problems of proof" that no longer exist.

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[4] The Court also suggested that the goal of "finality" is served by restricting claimants to legitimate and those illegitimates with prior judicial determinations of paternity. 439 U.S. at 525-26. That problem, however, can be addressed by adopting a rule prescribing adequate forms of notice to potential claimants and deadlines for filing claims.

It would be particularly anomalous to ignore the developments in techniques for proving paternity in the instant context, in view of the prominent role such advances played in the *Mills-Pickett-Clark* trilogy. Thus, as far back as 1982 in *Mills*, Justice O'Connor noted in a concurring opinion joined by four other justices that "[t]he state's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father." 456 U.S. at 104, n.2 (O'Connor, J., concurring). And more recently, in *Clark v. Jeter*, Justice O'Connor, writing for a unanimous Court, reiterated the point. She noted that Congress in 1984 had effectively mandated that states change their statutes of limitations governing paternity suits against living putative fathers to 18 or more years. 486 U.S. at 465. And she explained:

> The legislative history of the federal Child Support Enforcement Amendments explains why Congress thought such statutes of limitations are unreasonable. Congress adverted to the problem of stale and fraudulent claims, but recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child. H.R. Rep. No. 98-527, p. 38 (1983). This scientific evidence is available throughout the child's minority, and *it is an additional reason to doubt that Pennsylvania had a substantial reason for limiting the time within which paternity and support actions could be brought.*

Id. (emphasis added).

It is now equally clear that, even if states once had a "substantial reason" to bar assertions of paternity after

a father's death, that is no longer the case. It has now become a form of pure invidious discrimination for a state to adhere the rule that a person loses the right to make a claim to inheritance by intestate succession if her father happens to die when she is an infant, prior to the successful assertion on her behalf of a judicial paternity claim. The Court should grant review to rectify a problem that has arisen as a constitutional decision based on then-existing facts has become grossly outmoded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan. 12, 1999]

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

No. 91,420

IN THE MATTER OF THE ESTATE OF
GERTRUDE JO GELLER, deceased.

HOLLY WHITE,

Appellant,

vs.

DAVID L. FIST, personal representative of the ESTATE OF GERTRUDE JO GELLER, deceased; LORI ANNE CHOZEN; JAY MYERS CHOZEN; MICHAEL ALAN CHOZEN; MARSHALL GELLER; and, TEMPLE ISRAEL FOUNDATION, INC.,

Appellees.

Appeal from the District Court of
Tulsa County, Oklahoma

Honorable David E. Winslow, Trial Judge

AFFIRMED

OPINION

STUBBLEFIELD, P.J.

This is an appeal from judgment in a probate case, based on a finding that contestant lacked standing, denying a will contest and striking a counterclaim requesting determination of heirship. Based on our review of the record on appeal and applicable law, we affirm.

The record reveals that Gertrude Geller was married to Louis Myers for many years and had two children from that marriage, a son, Jay, and a daughter, Linda. Jay Myers was born on June 13, 1936, and died of leukemia on March 3, 1961. Jay Myers had never married, never adopted a child nor took a child into his home and was never determined to be the father of any child in a paternity action or named a party in such an action prior to his death. Linda Myers Chozen died on February 22, 1991. She was survived by three children, Lori Chozen, Michael Chozen and Jay Myers Chozen.

In 1975, Gertrude Geller married Marshall Geller. There were no children from that marriage.

On May 25, 1991, Plaintiff Holly White contacted Gertrude Geller by telephone, claiming to be her granddaughter—the child of Mrs. Geller's deceased son, Jay Myers. Apparently, Mrs. Geller did not wish to communicate with White and, through her attorney, David Fist, requested that White refrain from further attempts to contact her.

On June 26, 1991, Gertrude Geller executed her Last Will and Testament.[1] After gifts to grandnieces and grandnephews and certain charitable gifts, including a

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[1] Gertrude Geller executed three codicils to her will, in October 1993, September 1994 and February 1997.

substantial charitable gift to Temple Israel Foundation, Gertrude Geller named Linda's three children as her residual beneficiaries. "Article IX" of her will contained the following "Forced Heirship and Will Contest Clause:"

> 1. I hereby direct that should there be anyone not herein specifically or indirectly mentioned or provided for who would inherit a portion of my estate had I not executed this Will, such person or persons shall receive One Dollar ($1.00) as his, her or their sole and entire inheritance from me.

Gertrude Geller died on October 26, 1997, leaving a substantial estate. Three days later, after learning of Mrs. Geller's death through a newspaper obituary, Holly White filed (1) petitions for letters of administration and determination of heirship, (2) a motion seeking to take a tissue specimen from Gertrude Geller's body, and (3) a motion for temporary restraining order seeking to enjoin the interment of Mrs. Geller's body. White alleged she was the child of Jay Myers—that her mother had a sexual encounter with Myers in 1959 in Kansas City, Missouri, which resulted in White's birth on December 25, 1959—and she sought to inherit her pro rata share of Geller's estate.

Another petition for probate of will was filed by attorney David Fist on behalf of the Estate of Gertrude Geller.[2] White filed a counterclaim seeking to prove her heirship as a pretermitted granddaughter of Mrs. Geller. She filed various pleadings in the probate action, including a motion for partial summary judgment asserting that the terms of Geller's will and the provisions of 58 O.S. 1991 § 132, required determination by the trial court

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[2] Fist was named as second successor personal representative in the will and alleged that others named had declined to serve. Fist was appointed as special administrator of the estate.

that she was a pretermitted heir to Geller's estate as a matter of law—subject to her ability to prove that Jay Myers was, in fact, her biological father.

The special administrator moved to strike White's pleadings on the ground that she had no standing to pursue her claims of inheritance as a pretermitted grandchild in the probate court due to her undisputed inability to establish any of the four grounds set forth in 84 O.S.1991 § 215,[3] for an out-of-wedlock child to show paternity and inherit through the father. The Chozen family also filed a motion for summary judgment based on standing and the will's *in terrorem* clause. The issues were thoroughly briefed.

The trial court rendered judgment on the dispositive issue of standing. The trial court sustained the special administrator's motion to strike all pleadings filed by White. In finding that White had no standing to make a claim in the proceeding, the trial court adopted "*in toto*" the reasoning and legal authorities set forth in the briefs filed by the special administrator, Temple Israel and the Chozen family that specifically addressed the issue of standing. White appeals.

As a preliminary matter, we note that, technically, a motion to strike was not the proper method for disposing of the counterclaim and other pleadings filed by White. Title 12 O.S.1991 § 2012(D), provides only for motions to strike "an insufficient defense." The proper method for asserting a party's lack of standing is by motion to dismiss. *See Independent Sch. Dist. No. 9 of Tulsa County v. Glass*, 1982 OK 2, ¶ 10, 639 P.2d 1233, 1237.

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[3] The statute was revamped and amended in 1977 to cure the 1910 law's unconstitutional "inheritance discriminaton against a non-connubial child and [now] places the latter on the same heirship footing with a connubial chlid." *Vincent v. Sutherland*, 1984 OK CIV APP 4it ¶ 9 n.2, 691 P.2d 85, 87 n.2.

Thus, we view the improperly denominated motion to strike filed by the special administrator as the functional equivalent of such a motion under section 2012(B)(6)—a motion to dismiss for failure to state a claim upon which relief can be granted. However, because matters outside the pleadings were presented to and not excluded by the trial court, the motion must be treated as one for summary judgment. Section 2012(B).

In her first proposition of error, White specifically addresses the issue of standing. A party has standing either through a specific statute authorizing invocation of the judicial process or if she alleges a personal stake in the outcome of the controversy—"a sufficient interest in an otherwise justiciable controversy to obtain judicial resolution of the controversy." *Glass*, 1982 OK 2 at ¶ 8, 639 P.2d at 1237. To have standing to participate in a probate proceeding or to object to the probate of a will, a person must have an interest in the property that the testator owned at his death. *See Mayweather v. Wallace*, 195 Okla. 587, 159 P.2d 529 (1945); *In re Estate of Dilley*, 1996 OK CIV APP 64, ¶ 8, 919 P.2d 458, 460.

White summarizes her argument on the issue of standing as follows:

> Upon the death of the decedent, Gertrude Geller, White vested in her right to share in the decedent's estate as a pretermitted paternal granddaughter. Based upon this vested right, White had standing to prove heirship in the probate court.

However, under Oklahoma law, children born out of wedlock may become heirs of and inherit through their father *only* by the methods set forth in 84 O.S.1991 § 215, which provides:

> For inheritance purposes, a child born out of wedlock stands in the same relation to his mother

> and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. *For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever*: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, *or* (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction. (Emphasis added.)

The supreme court has noted that this statute places special burdens on children born out of wedlock before they can inherit through their father. *In re Estate of King*, 1990 OK 138, ¶ 6, 837 P.2d 463, 464.

It is undisputed that part (a), part (b) and part (d) are not applicable herein. White does not allege that a written parental acknowledgment exists or that her parents intermarried. Further, no determination of paternity was made before Jay Myers' death. White's only evidence goes to part (c)—public acknowledgment. She offered the affidavit of her mother, which stated: (1) In June 1959, she had informed Jay Myers she was pregnant with his child; (2) Myers advised her that "he had discussed the matter with his father and that his father had told him to 'do the right thing;' " (3) Jay Myers offered to provide financial assistance; and, (4) She called Myers again near

the term of her pregnancy and he gave his reassurance and again offered his financial assistance.

We find this evidentiary material simply fails to establish the statutorily required public acknowledgment of section 215(c)—it fails to show that Jay Myers held Holly White out to his relatives, friends, acquaintances and the whole world as his own. *Kirkland v. Henry*, 1956 OK 130, ¶ __, 296 P.2d 165, 167; *In re Cravens' Estate*, 1954 OK 82, ¶ __, 268 P.2d 236, 240. Therefore, the affidavit does not raise a material issue of fact precluding summary judgment.

Focusing on the language of section 215(d), White urges a construction of that language that would authorize her to bring a paternity proceeding against Jay Myers within this probate proceeding despite the fact that Myers has been dead for thirty-seven years. However, the court in *King* stated that section 215(d) requires "a judicial determination of paternity *before the death of the father.*" 1990 OK 138 at ¶ 12, 837 P.2d at 467 (emphasis added). We cannot agree with White's contention that the court's language is dicta.

Moreover, we do not view the trial court's ruling herein as one that completely precluded White from proving heirship in the probate court. The extensive briefs and evidentiary materials filed below indicate that the trial court gave White ample opportunity to show paternity/heirship through the four methods that the legislature clearly and explicitly set forth in section 215. Indeed, at the hearing on the motion to strike, the trial court asked White's counsel more than once if there was "anybody else" who could serve as a witness on the public acknowledgment issue.

What the trial court did not allow White to do was prove heirship by her preferred method—exhumation of

her alleged father's body—a method that the legislature did not include in section 215. As section 215(d) is phrased—"the father *was* judicially determined to be such in a paternity proceeding . . ."—it does not appear to contemplate post-death genetic testing, and the supreme court has explicitly stated that it does not. *Id.*

In White's final proposition of error, and its sub-propositions, she claims section 215 is unconstitutional as applied to her. She attacks section 215(d) on equal protection grounds, calling it an impermissible special law, and asserts that, if section 215(d) requires a "before death" determination of paternity, the statute operates to deny her vested right to inherit by and through her father without due process of law. For the following reasons, we find no merit to any of White's constitutional claims.

First, in *King*, the supreme court specifically concluded that "[s]ection 215 of title 84 does not violate the Equal Protection Clause of the federal Constitution." *Id.* at ¶ 10, 837 P.2d at 466. Moreover, White's due process rights are not implicated. She argues that past circumstances operated to preclude her from obtaining her inheritance rights: (1) At the time of Jay Myers' death in 1961, the existing version of section 215 was unconstitutional; (2) She had no opportunity to undertake a paternity action during Jay Myers' lifetime due to her incapacity as a minor; and, (3) When the legislature added section 215(d) in 1977, she was precluded from using the amendment because her alleged father had been dead for sixteen years.

However, contrary to White's assertions, she had no "vested right" during any of these three periods to inherit from Gertrude Geller's estate through Jay Myers. As the court noted in *In re Smith's Estate*, 188 Okla.

158, 161, 107 P.2d 188, 191 (1940) (citations omitted) (emphasis added): "[T]he *prospect* of inheritance does not constitute a vested right and is not properly defined as property." The laws of descent and distribution are subject to change at any time, and "no one has a vested right to inherit the property of any person prior to the time descent is cast." *Minshall v. Berryhill*, 83 Okla. 100, 104, 205 P. 932, 935 (1921). Any rights of inheritance extended to White would not have accrued until the time of Gertrude Geller's death, *Hurt v. Noble*, 1991 OK CIV APP 59, 817 P.2d 744, and would be governed by the law in effect *at that time*. *See In re Estate of Baxter*, 1992 OK CIV APP 15, ¶ 17, 827 P.2d 184, 187.

White also asserts that section 215 is an "ex post facto law" and an unconstitutionally impermissible bill of attainder. These assertions also are without merit.

As noted above, White had no accrued or vested right to make a claim against Gertrude Geller's estate at any time before Mrs. Geller's death. Thus, application of the 1977 amendment of section 215 does not retrospectively affect any legal consequences or relations. It simply is not an ex post facto law.

Nor is section 215 a bill of attainder. White is correct in pointing out that bills of attainder are prohibited by U.S. Const. art. I, §§ 9 and 10, and Okla. Const. art. 2, § 15. A bill of attainder is a legislative act that inflicts punishment without judicial trial. *Board of Regents of Okla. Agric. Colleges v. Updegraff*, 205 Okla. 301, 237 P.2d 131 (1951), *rev'd on other grounds, Wieman v. Updegraff*, 344 U.S. 183 (1952). Punishment is a prerequisite for a law to be a bill of attainder. *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 722 (1951). A Supreme Court Justice has noted:

> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). The Oklahoma Supreme Court also has recognized that a statute does not inflict punishment on an individual merely because it prevents him from doing what he otherwise could do in the absence of such statute. *Golden v. Okfuskee County Election Bd.*, 1986 OK 57, 723 P.2d 982. No punishment is imposed by section 215, and no offense is identified. Therefore, it is not a bill of attainder.

Conclusion

The Oklahoma Supreme Court has determined that 84 O.S. 1991 § 215, in its present form, and with the "special burdens" it imposes, is constitutional and protects the State's legitimate interest in the orderly disposition of estates. *King*, 1990 OK 138 at ¶ 10, 837 P.2d at 466. The statute provides four methods by which a child born out of wedlock can establish paternity for purposes of inheriting from or through the father. The evidentiary materials of record show that White is unable to establish paternity by any of the four statutory methods. Therefore, White is not an heir of Gertrude Geller[4] and has no

---

[4] Of course, it follows that if White is not an heir—she is not entitled to inherit from Gertrude Geller through her alleged father, Jay Myers—she cannot be a pretermitted heir under 84 O.S. 1991 § 132.

standing in the probate proceeding. In effect, White asks this court to rewrite section 215 to allow the exhumation and genetic testing of her alleged father. This we cannot do. The right to inherit property is granted solely by statute, *In re Estate of Baxter*, 1992 OK CIV APP 15, ¶ 17, 827 P.2d 184, 187, and succession to estates is strictly a matter of statutory regulation, which cannot be changed by courts. *In re Estate of Swartz*, 1994 OK CIV APP 7, ¶ 3, 870 P.2d 179, 180.

In view of the foregoing rationale, the trial court's order, which in effect granted summary judgment against White on her counterclaim for determination of heirship in the probate proceeding, is AFFIRMED.

BOUDREAU, V.C.J., and REIF, J., concur.

January 12, 1999

APPENDIX B

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

No. P-97-870-Winslow

In the Matter of the Estate of:

GERTRUDE JO GELLER, Deceased

JOURNAL ENTRY OF JUDGMENT AND ORDER STRIKING ALL PLEADINGS FILED BY HOLLY WHITE

On May 13, 1998, this matter came on for hearing on the motion by the petitioner/special administrator, David L. Fist ("Special Administrator"), to strike all pleadings filed in this matter by Holly White ("White").

The Special Administrator was present and represented by J. Douglas Mann of Rosenstein, Fist & Ringold. White was represented by Anthony P. Sutton of Herrold, Herrold, Sutton & Davis, P.A. Also appearing in this matter was Oliver S. Howard and Jeffrey D. Hassell of Gable, Gotwals, Mock, Schwabe, Kihle & Gaberino on behalf of Temple Israel Foundation, Inc. ("Temple Israel"); Frederic Dorwart and Richard J. Cipolla, Jr., of Frederic Dorwart, Lawyers, on behalf of Lori Ann Chozen, Michael Alan Chozen and Jay Myers Chozen (the "Chozen Family"); and W. Thomas Coffman of Johnson, Allen, Jones & Dornblaser on behalf of Marshal Geller.

After hearing argument of counsel for the Special Administrator, White and Temple Israel, and after reviewing

all of the briefs submitted by the parties with regard to the issue of White's standing to make a claim in this matter, the court found that the Special Administrator's motion to strike all of the pleadings filed by White should be sustained. The court further found that White has no standing to make any claim in this proceeding. In sustaining the Special Administrator's motion to strike all pleadings filed by White, and in finding that White has no standing to make a claim in this proceeding, the court adopts *in toto* the reasoning and legal authorities set forth in the briefs filed by the Special Administrator, Temple Israel, and the Chozen Family which specifically addressed the issue of the Special Administrator's motion to strike and White's standing in this matter.

The court further found that the Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees should be set for hearing on June 15, 1998, at 9:30 a.m.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Special Administrator's motion to strike all pleadings filed by Holly White is sustained and that Holly White has no standing to make a claim in this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees is set for hearing on June 15, 1998, at 9:30 a.m.

_____

Judge of the District Court

APPROVED AS TO FORM:

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APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 6, 1999

THE COURT IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

91,420

In the Matter of the Estate of

GERTRUDE JO. GELLER, Deceased.

HOLLY WHITE

v.

DAVID L. FIST, Personal Representative of the Estate of Gertrude Jo. Geller, Deceased *et al.*

Certiorari denied.

All Justices concur.

/s/ Hardy Summers
Chief Justice

APPENDIX D

IN THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

No. P-97-870

IN THE MATTER OF THE ESTATE OF

GERTRUDE JO GELLER,

Deceased.

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Diane M. White, being of lawful age, and after first being duly sworn upon oath, state as follows:

1. I am the natural mother of Holly White.

2. I met Jay Myers, of Tulsa, Oklahoma, in Kansas City, Missouri, on or about March 22, 1959.

3. Jay Myers and I had a sexual encounter from which I became pregnant.

4. On December 25, 1959, I gave birth to my daughter, Holly White.

5. At the time of Holly White's birth, I was a resident of Kansas City, Missouri, and my domicile was in the state of Missouri. I am presently a resident of Kansas City, Missouri.

6. It is my belief and knowledge that Jay Myers is the natural father of my daughter, Holly White. I had no other sexual relationships which could have resulted in this pregnancy.

7. It is my belief and understanding that Jay Myers is the son of Gertrude Geller, the decedent in the above-referenced matter.

8. In June 1959, I informed Jay Myers that I was pregnant with his child. In response to my advice, he advised that he had discussed the matter with his father and that his father had told him to "do the right thing." He further inquired as to whether he and I should get married. He further offered to provide financial assistance.

9. In November 1959, nearing the term of my pregnancy, I called Jay Myers from a home for unwed mothers. Upon my advice to him that I felt lonely and afraid, he gave me his reassurance and again offered financial assistance.

10. At the end of January or the first of February 1960, I again contacted Jay Myers to advise him that his child was a girl and I further gave him a detailed description of Holly's physical appearance.

Further, Affiant saith not.

/s/ Diane M. White
DIANE M. WHITE

[Notary Omitted]

APPENDIX E

[Filed Jun. 5, 1998]

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. P-97-870

IN THE MATTER OF THE ESTATE OF

GERTRUDE JO GELLER,

Deceased.

TRANSCRIPT OF PROCEEDINGS
HAD BEFORE DAVID E. WINSLOW, DISTRICT JUDGE
TULSA COUNTY, OKLAHOMA
MAY 13, 1998

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[54] The Ohio case is a 1988 case, a jurisdiction far removed from us, and far removed in time to the '92 decision by the Oklahoma Supreme Court.

I have had many cases where we have had attempts to prove the paternity of a child. It is true that 215 has, first of all, the four requisites, but it's also true that number three has its five elements. All of this runs together. This case, as far as the application of White, fails miserably in every regard.

I will sustain the Motion To Strike all of the White pleadings. She has no standing. She has never had standing under Oklahoma law. She does not have standing under Oklahoma law today. And there's going to be a

dramatic change in our inheritance laws for her to ever have standing.

Therefore, we will set this matter—first, I'll also say that I will adopt in toto the reasons stated in Mr. Mann's brief and Mr. Oliver's [sic] brief, joined by Dorwart and Hassell, and further stated by Mr. Coffman.

Gentlemen, we need now to arrive at a date for the formal hearing date for the admission of the will and the appointment of the personal representative.

* * * *

[Certification Omitted]

APPENDIX F

Okla. Stat. tit. 84 § 215

§ 215. Inheritance by and from illegitimate child

For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

For all purposes, the issue of all marriages null in law, or dissolved by divorce, are deemed to have been born in wedlock. R.L.1910, § 8420. Laws 1977, c. 36, § 1, eff. Oct. 1, 1977.

Okla. Stat. tit. 84 § 215
(prior to 1977 amendment)

§215. Inheritance by and from illegitimate child.— Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and

in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate. R.L.1910, § 8420.

C.L.Dak.1887, § 3403; C.S.1921, § 11303; St.1931, § 1610.

Supreme Court, U.S.
FILED
AUG 9 1999
OFFICE OF THE CLERK

No. 99-1

(2)

In The

Supreme Court of the United States

HOLLY WHITE,

Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN and LORI ANNE CHOZEN,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

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41PP

QUESTION PRESENTED

Whether this Court should overrule its decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), and create a new constitutional right to establish paternity in an estate proceeding when paternity had not been established prior to the death of the putative father and when establishing such paternity would require the exhumation of human remains.

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STATEMENT OF THE CASE

Petitioner asks this Court to grant certiorari to decide whether the United States Constitution entitles her to exhume the body of her putative father, dead for over 38 years, in order to obtain a tissue sample and initiate a paternity proceeding so as to make a claim against the estate of her putative grandmother. The decision Petitioner would have this Court review is a non-precedential decision of the Oklahoma Court of Civil Appeals[1] construing Okla. Stat. tit. 84., § 215 in a manner that, petitioner concedes, is entirely consistent with this Court's holding in *Lalli v. Lalli*, 439 U.S. 259 (1978). Petitioner expressly asks that this Court (i) overrule *Lalli* and (ii) declare unconstitutional Okla. Stat. tit. 84, § 215 (1991), as applied in this case.

Petitioner advances two arguments for granting the writ – that cases subsequent to *Lalli* have rendered the underpinnings of that case unsound, and that scientific developments have had the same effect. Both arguments are based on a misapprehension of the premises underlying *Lalli* itself, a misreading of the subsequent case law, and a misguided view as to the role this Court should play in addressing the extraordinary social policy implications of advances in genetic identification. Moreover,

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[1] Under Oklahoma law, state trial courts are free to disregard published decisions of the Oklahoma Court of Civil Appeals unless the Supreme Court of Oklahoma has expressly approved the decision for publication. *Sholer v. State*, 945 P.2d 469, 473 (Okla. 1995); Rules of the Oklahoma Supreme Court, Rule 1.200(c)(2). The Oklahoma Supreme Court merely denied certiorari in this case (Pet. App. at 16a).

even taking Petitioner's arguments on their own terms and assuming that reconsideration of settled precedents in this area were justified at this time, a multitude of reasons make this unique case extremely unsuitable as a vehicle for reviewing the Court's decisions in this area.

Factual Background

The late Gertrude Geller outlived both of her children. Her son, Jay Myers, died of leukemia in 1961. He was 24 when he died. Six years later, Mrs. Geller's first husband, Louis P. Myers, passed away. Mrs. Geller married Marshall Geller in 1975. Early in 1991, thirty years after her son's death, Mrs. Geller's daughter, Linda Myers Chozen, also passed away. In poor health and grieving the loss of her only remaining child, Mrs. Geller received a telephone call in May of 1991 from a stranger who claimed that she was Mrs. Geller's granddaughter. That stranger was the Petitioner, Holly White.

Petitioner claimed that Mrs. Geller's son, Jay Myers, was her father. In a letter to Mrs. Geller that Petitioner sent approximately two weeks after the initial phone call, Petitioner elaborated on her claim. Petitioner said that she was 31 years old.[2] She said that she had been trying for years to learn about her past but had not learned the "real story" from her mother until approximately a year earlier. She claimed that information had "flooded in" since then. Yet she admitted that the only evidence she had to support her story was the alleged statement of one

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[2] Petitioner later alleged that she was 15 months old at the time of Jay Myers' death.

of Jay Myers' high school friends, who, according to Petitioner, told Petitioner after seeing a picture of her that she reminded him of Jay.

Not surprisingly, Mrs. Geller was not receptive to Petitioner's attempts to ingratiate herself. On July 8, 1991, Mrs. Geller's attorney, Respondent David L. Fist, wrote to Petitioner and advised her that her communications had caused Mrs. Geller a great deal of emotional stress. Mr. Fist also advised Petitioner that Mrs. Geller faced the prospect of surgery in the near future and asked Petitioner not to attempt to contact Mrs. Geller until Mrs. Geller had recovered somewhat from the death of her daughter and her own health problems.

In October of 1991, some five months after Petitioner had first made contact with her, Mrs. Geller directed Mr. Fist to draft a letter informing Petitioner that Mrs. Geller did not wish to have any contact with her. Mrs. Geller explained that because of her health problems and the fact that she had survived both of her children, she was unable to cope emotionally with the situation that Petitioner's claim presented. Mrs. Geller stated that she believed that contact with Petitioner would only increase her pain, and she asked that Petitioner make no further attempts to contact her.

On June 26, 1991, approximately one month after Petitioner's initial telephone call to Mrs. Geller, Mrs. Geller executed her Last Will and Testament, which contained the following provision:

ARTICLE IX

Forced Heirship and Will Contest Clause

1. I hereby direct that should there be anyone not herein specifically or indirectly mentioned or provided for who would inherit a portion of my estate had I not executed this Will, such person or persons shall receive One Dollar ($1.00) as his, her or their sole and entire inheritance from me.

Mrs. Geller subsequently executed her First, Second, and Third Codicils to her Last Will and Testament in October of 1993, September of 1994, and February of 1997, respectively, with the "forced heirship" clause remaining intact.

At the time of the execution of her Will, and at the time she executed each of the Codicils to her Will, Mrs. Geller was aware of Petitioner's claim to be her granddaughter. At all of these times, Mrs. Geller was mentally alert and aware of the extent of her assets and the provisions she was making for their disposition. Mrs. Geller specifically communicated to Mr. Fist, the attorney who drafted her Last Will and Testament, her desire to include the forced heirship clause in her Will to address any claim Petitioner and others might make against Mrs. Geller's estate.

Mrs. Geller died on October 26, 1997.

In her letter to Mrs. Geller, and in subsequent letters to Mr. Fist and to Respondent Lori Chozen, Petitioner repeatedly disclaimed any interest in what she characterized as "the well publicized family fortune." Petitioner repeatedly stressed in this correspondence that her only interest was in tracing her ancestry and establishing her

"roots." Yet on October 29, 1997, after five years of silence and just three days after Mrs. Geller's death, Petitioner initiated an action in the District Court of Tulsa County, Oklahoma, seeking letters of administration in the estate of Mrs. Geller, a determination of heirship, and an *ex parte* Temporary Restraining Order to enjoin Mrs. Geller's husband and grandchildren from interring her body until after Petitioner could obtain a DNA sample from Mrs. Geller's body.[3] The district court refused to enter the *ex parte* order sought by Petitioner, and Mrs. Geller's body was interred in the family plot with her son and her first husband pursuant to her family's wishes.

Mrs. Geller and her family were members of the Jewish faith. Mrs. Geller, Jay Myers, and Mrs. Geller's first husband, Louis P. Myers, are all interred in the same burial plot in the Jewish section of Rose Hill Cemetery in Tulsa, Oklahoma. Mrs. Geller's spiritual advisor during her last years was Rabbi Charles P. Sherman of Congregation Temple Israel in Tulsa, Oklahoma. Rabbi Sherman submitted an uncontroverted affidavit that is part of the record of this action. In his affidavit, Rabbi Sherman stated that exhuming a body is a violation of the fundamental principles of the Jewish faith and is contrary to the basic code of Jewish law, unless the disinterment is to remove the body for burial in the Holy Land, to carry out the wishes of the deceased, or to permit the deceased to

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[3] Although Petitioner's pleadings were filed in a separate action with a separate case number, copies of Petitioner's pleadings from that action were included as exhibits to a brief filed by Respondent Mr. Fist in the instant action and are therefore included in the record of this action.

be reburied with his family, particularly his widow. Rabbi Sherman also noted that the ground where Mrs. Geller, her husband and son are buried is owned by and subject to the control of Temple Israel, and the rules and regulations of Temple Israel pertaining to the cemetery do not recognize exhumation, except in accordance with reasons permitted under Jewish law.

Proceedings Below

On November 5, 1997, Mr. Fist filed a Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees on behalf of Mrs. Geller's estate in the District Court of Tulsa County. Petitioner filed an Answer and Counterclaim seeking an intestate share of Mrs. Geller's estate as a pretermitted heir. Petitioner conceded in pleadings filed in this action that Jay Myers was never married, never adopted a child, never took a child into his home, and was never determined to be the father of any child in any paternity action prior to his death. Indeed, undisputed evidence was presented that Jay Myers was never named as a party in any paternity action prior to his death.

The District Court of Tulsa County ultimately ruled that Petitioner had no standing under Oklahoma law to contest Mrs. Geller's Will, and that decision was affirmed by the Oklahoma Court of Civil Appeals. The Oklahoma Supreme Court declined to review the decision of the Court of Civil Appeals.

Petitioner now asks this Court to grant certiorari and reverse the Oklahoma Court of Civil Appeals, on the theory that the Constitution and three of this Court's

decisions should be read as requiring the exhumation of Mrs. Geller's body or the body of Jay Myers[4] to allow her to perform DNA testing. According to Petitioner, this test will establish that she is Jay Myers' daughter and thus enable her to make a claim against Mrs. Geller's estate.

REASONS FOR DENYING THE WRIT

This Court has long held, for very good reasons, that "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in [the State] by a man dying there is committed by the Constitution of the United States and the people . . . to the legislature of that State." *Labine v. Vincent*, 401 U.S. 532, 539-40 (1971). *See, e.g., Reed v. Campbell*, 476 U.S. 852, 855 (1986) ("The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, *of course*, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted." (emphasis added)); *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (citing numerous cases recognizing that states have "an interest of considerable magnitude"

[4] As noted above, Petitioner initially sought to take a DNA sample from Mrs. Geller's body. After Mrs. Geller was interred, Petitioner contended that she should be permitted to exhume the body of Jay Myers for the purpose of DNA testing. The record is unclear as to which of the decedents, Mrs. Geller or Jay Myers, Petitioner now seeks to exhume.

in the orderly disposition of property upon death); *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) ("The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states."). Indeed, the same year the Court decided *Clark v. Jeter*, 486 U.S. 456 (1988), the most recent of the cases on which Petitioner relies, the Court observed in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489 (1988):

> [T]he State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims.

Although it is framed as a challenge to just one of the many decisions in this line – *Lalli v. Lalli* – the petition for a writ of certiorari in this case in fact urges a fundamental departure from the principles of deference to state legislative choices that underlie *all* of this Court's decisions in this area. Contrary to Petitioner's assertions, there is no tension in this Court's own cases requiring such a departure, and no conflict among courts anywhere relevant to the matter at issue.

This case would also be an extremely unsuitable vehicle for review of the Court's decisions in this area for reasons unrelated to the arguments advanced by Petitioner. It is clear that Petitioner will have no right to a recovery from Mrs. Geller's estate under Oklahoma law

because Petitioner's claims are flatly barred by the Oklahoma statute of limitations for paternity claims – an effective 19-year limitations period that exceeds the 18-year period endorsed by this Court in *Clark v. Jeter*, 486 U.S. 456, 465 (1988). In addition, Mrs. Geller expressly disinherited Petitioner in her will, and that disinheritance is effective under Oklahoma law to preclude any recovery by Petitioner from Mrs. Geller's estate.[5]

For the foregoing reasons, which will be set forth more fully below, Respondents urge that Petitioner's Petition for Certiorari be denied.

I. NEITHER SUBSEQUENT CASE LAW NOR DEVELOPMENTS IN DNA TESTING WARRANT RECONSIDERATION OF THE COURT'S HOLDING IN *LALLI*

In *Trimble v. Gordon*, 430 U.S. 762 (1977), this Court struck down a flat prohibition against paternal inheritance through intestate succession by illegitimate children. In so doing, however, this Court explicitly recognized that "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States." *Id.* at 771. Although courts, as always, must give "substantial deference to a State's statutory scheme of inheritance," *id.*, the problem the Court recognized in *Trimble* was that the sweeping

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[5] As noted *infra* at 23, these arguments were raised in the lower courts but were not addressed there because Okla. Stat. tit. 84, § 215(d) was dispositive of Petitioner's claims.

Illinois law at issue *totally* excluded *all* illegitimate children from ever inheriting from their fathers through intestate succession – even where, as in that very case, paternity had already been conclusively established and acknowledged by the father prior to his death. It was perfectly clear, in other words, that "[f]or at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under the intestacy laws." *Id.; see also id.* at 772 ("Difficulties of proving paternity in some situations do not justify the *total* statutory disinheritance of illegitimate children whose fathers die intestate."). Thus, because the state's law did not bear a substantial relationship to its asserted legitimate interest in the orderly settlement of estates, the law at issue in *Trimble* was constitutionally flawed.

The reasoning in *Trimble* all but foreordained the result in *Lalli v. Lalli*, 439 U.S. 259 (1978), whose author – Justice Powell – also authored *Trimble*. *Lalli* involved a state law requiring that, before an illegitimate child could inherit through an intestate father, the child had to establish paternity in a judicial proceeding *prior to the death* of the putative father.[6] Contrasting the "broad

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[6] It is worth noting that the New York law upheld in *Lalli* was decidedly *less* generous than the Oklahoma law at issue here, which – as construed in this case by the Oklahoma Court of Civil Appeals – allows an individual to establish paternity not only through a pre-death judicial determination (as was the case with the law in *Lalli*), but also through written acknowledgment of paternity by the father, public acknowledgment of the child by the father or the subsequent

disqualification" of illegitimate intestate inheritance rejected in *Trimble*, the *Lalli* Court – citing a line of decisions dating back more than a century recognizing that states have "an interest of considerable magnitude" in the "orderly disposition of property at death," 439 U.S. at 268 – held that the state's interest in orderliness and accuracy in the estate proceeding sufficiently justified the proof requirement imposed by the statute at issue. "The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences." *Id.* at 271. Thus, because the statute was "substantially related to the important state interests the statute [was] intended to promote," *Lalli*, 439 U.S. at 275-76, the Court held that the statute satisfied constitutional requirements. *See also id.* at 273 (noting that the reach of the statute was not "far in excess of its justifiable purposes," as in *Trimble*).

Petitioner suggests two reasons why the petition should be granted and this Court's decision in *Lalli* overruled. *First*, Petitioner argues that subsequent developments in the case law have altered the legal landscape against which *Lalli* was set. *Second*, Petitioner asserts that developments in the use and accuracy of DNA identification have altered the factual landscape. Both contentions are without merit.

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marriage of the father to the child's mother. Okla. Stat. tit. 84, § 215 (1991).

A. The Subsequent Case Law Does Not Depart From *Lalli*

None of the three subsequent cases on which Petitioner relies – *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988) – signals any departure by this Court from the principles of *Trimble* and *Lalli*. Each of those cases involved not an effort to establish paternity in the context of an estate proceeding, but rather a claim for child support under a state statute mandating the provision of paternity benefits. Each merely represents an application of the unexceptional principle – recognized earlier in *Gomez v. Perez*, 409 U.S. 535 (1973) – that where a state decides to create a judicially enforceable right of a child to receive benefits from a father, there is no plausible state interest in excluding illegitimate children from the receipt of such benefits.

The question at issue in *Mills*, *Pickett*, and *Clark* was whether state laws requiring illegitimate children to establish paternity within one to six years of birth to receive paternal child support benefits violated the principle of *Gomez* by providing only an "illusory" opportunity to illegitimate children to establish paternity and thus to obtain child support. *Mills*, 456 U.S. at 97. As the Court recognized in *Mills*, the state might have a legitimate interest in avoiding "stale claims" for child-support benefits, *id.* at 99, but the one-year limitations period in that case – and the two- and six-year periods in *Pickett* and *Clark* – could not be justified on that basis because the states could not show that evidence would in fact

grow "stale" within the limitations period. *Clark*, 486 U.S. at 464-65; *Pickett*, 462 U.S. at 14-15; *Mills*, 456 U.S. at 101.

But the question whether there is a sufficient connection between the state interest in avoiding stale child-support claims and a rigid limitations period on filing such claims has nothing whatsoever to do with the question at issue here and in *Lalli* – i.e., whether there is a sufficient connection between the state interest in ensuring the orderly disposition of property upon death and requiring establishment of paternity prior to death. In *Lalli*, this Court expressly observed that "[t]he presence in this case of the State's interest in the orderly disposition of a decedent's property at death distinguishes it from others in which that justification for an illegitimacy-based classification was absent." *Lalli*, 439 U.S. at 268 n.6. Indeed, one of the cases explicitly distinguished by *Lalli* was *Gomez v. Perez*, 409 U.S. 535 (1973) – the fountainhead of the child-support trilogy. And, far from departing from *Lalli*, the very first case in that trilogy, *Mills*, approvingly cites *Lalli* as exemplifying a case in which a state statute affecting illegitimate children was in fact "substantially related to a legitimate state interest." *Mills*, 456 U.S. at 99. Even after the first *two* child-support cases relied upon by Petitioner had been decided, this Court again saw fit to reaffirm the core *Trimble/Lalli* principle. *See Reed v. Campbell*, 476 U.S. 852, 855 (1986) ("The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted.").

The *Mills-Pickett-Clark* trilogy, in sum, rests on the weakness of an asserted state interest that is fundamentally different from the state interest implicated in *Trimble* and *Lalli*. As such, the child support trilogy does nothing at all to undermine the continuing vitality of *Lalli* and the important principles that undergird it.

It is the same misreading of *Lalli* and *Trimble* that leads Petitioner to rely on an inapposite set of Social Security benefits cases in the Eleventh and Ninth Circuits in an effort to persuade the Court to review this – very different – case. Indeed, in the leading Eleventh Circuit decision on which Petitioner bases her claims of judicial retreat from *Lalli*, the court of appeals expressly acknowledged the important distinction between this Court's decision in *Lalli* and judicial disputes over Social Security benefits:

> Since the primary purpose of survivors benefits is to provide support for dependents of a deceased wage earner [citations omitted], we conclude that the governmental interests in this case – i.e., "preventing the prosecution of stale or fraudulent claims," *Mills*, 456 U.S. at 98 – are similar to those involved in other disputes over support. Thus, this case is more analogous to *Mills*, *Pickett* and *Clark* than to *Lalli*. Unlike *Lalli*, this case does not involve the orderly disposition of property at death.

Daniels v. Sullivan, 979 F.2d 1516, 1521 (11th Cir. 1992). As the court of appeals' reasoning demonstrates, the "conflict" between two federal circuits over the provision of survivors' benefits to illegitimate children under the federal Social Security Act is not one that concerns this case, or the Oklahoma estate law at issue here, in any way.

Even assuming the Court would be inclined to resolve a conflict when only two circuits have spoken to the issue, it obviously should do so in a case actually presenting Social Security survivors' benefits questions.

B. Subsequent Developments In DNA Testing Do Not Justify A Departure From *Lalli*

Petitioner's second – and final – argument for review is based on supposed advances in DNA technology that have improved the speed and accuracy of genetic identification. Petitioner insists that it is "high time" (Pet. at 3), for this Court to insert itself and the federal Constitution into the states' traditional dominion over estate administration and to override state policies requiring the establishment of paternity before death before an alleged illegitimate child may intercede in ongoing estate proceedings. Respondents respectfully disagree.

1. To begin with, whatever may be the truth of Petitioner's claims about advancements in DNA testing, Petitioner's reliance on those advancements as an argument for overruling *Lalli* is based on a fundamentally flawed premise. Petitioner's entire argument presupposes that the "often difficult problem of proving the paternity of illegitimate children" acknowledged in *Lalli*, 439 U.S. at 265, represents the entire sum and substance of the Court's longstanding tradition of deference to the states' judgments about how best to administer the estate proceedings of their residents. As seen from the discussion above, however, *Lalli* actually was following in an exceedingly long line of this Court's decisions recognizing the "interest of considerable magnitude" states have

in ensuring the orderly disposition of assets upon death, *Lalli*, 439 U.S. at 268 (citing cases), and the "substantial deference" courts accordingly owe to the schemes state legislatures devise for serving that interest, *Trimble*, 430 U.S. at 771. The lesson of these cases is not, as Petitioner would have it, that everything turns on the problems of proof in establishing paternity in an estate proceeding, but rather that state legislatures are much better situated to "regulate the disposition of property left [in the state] by a man dying there," *Labine*, 401 U.S. at 538, and that so long as the regulatory scheme the legislature devises is substantially related to legitimate state interests, there is no basis for federal judicial intervention. *See Lalli*, 439 U.S. at 273 ("Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.").

2. It is easy to see that the states' interest in the establishment of paternity prior to death as it relates to the disposition of their residents' assets upon death runs much deeper than concerns about problems of proof in the establishment of paternity – and thus that even if those problems are lesser in degree now than they were twenty years ago, the states still have interests directly served by a statutory scheme governing estate proceedings that requires the establishment of paternity prior to death. Indeed, the very facts of this case give the lie to Petitioner's suggestion that all is so well with DNA testing that courts need no longer bother with the parochial concerns of state legislatures. As Petitioner herself

acknowledges, if she has her way in this estate proceeding, the body of her putative father, dead for 38 years, will have to be exhumed and – as his own mother and her Rabbi see it – desecrated in order to evaluate Petitioner's claims of paternity. Their religious concern is hardly extreme: numerous mainstream religions regard exhumation of the dead as a violation of central tenets of faith.[7] As noted by the New York Court of Appeals:

> The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned. . . . *If the deceased had been a member of a faith which forbade disinterment*, if he had agreed with the cemetery corporation that there should be no exhumation whatsoever, if he had elected to be laid in hallowed earth and the request was for reburial in unconsecrated ground, then only *compelling considerations* would justify disinterment and removal.

Currier v. Woodlawn Cemetery, 90 N.E.2d 18, 19 (N.Y. 1949) (emphasis added). While a state may not necessarily be *required* to respect this sincerely and widely-held view, there can be no doubt but that states should be *allowed* to

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[7] As one state court observed:

> The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited, all civilized nations and many barbarous ones regard, in some measure at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was "God's Acre."

Dwenger v. Geary, 14 N.E. 903, 907 (Ind. 1888); *see also* 25 U.S.C. §§ 3001-3013 (Native American Graves Protection and Repatriation Act).

take such religious concerns into account in devising a system of rules governing the disposition of property upon death.

Indeed, even putting specifically religious concerns to one side, the point remains just as strong: surely a state has a legitimate interest in avoiding the extraordinary emotional stress that exhuming human remains would impose on the family members who are already suffering from the loss of their loved one.

Likewise, regardless of changes in the science of DNA testing, states also have a continuing interest in allowing their residents to decide for themselves the distribution of their property upon death. There is no judicially-enforceable "right" to inherit property. *Jefferson v. Fink*, 247 U.S. 288, 294 (1918); *In re Smith's Estate*, 107 P.2d 189, 190-91 (Okla. 1940); *see also Geller v. White*, Pet. App. at 8a-9a. Inheritance, rather, remains solely within the power and province of the testator. Thus a mentally competent father is freely able to distribute his estate among his children as he sees fit, which includes the freedom *not* to distribute to any given child. *Parnacher v. Mount*, 248 P.2d 1021, 1026 (Okla. 1952), *appeal after remand*, 306 P.2d 302 (Okla. 1956), *cert. denied*, 353 U.S. 958 (1957). In this scheme, the requirement of a pre-death paternity determination simply serves to allow a putative father to order his estate as he wishes, and to deal consciously with the claim of the illegitimate child before the father expires. Indeed, in this very case, Mrs. Geller became aware of Petitioner's claim and took steps in her will – as was her right under state law – to foreclose Petitioner's claim of any inheritance. (*See* Pet. App. at 2a-3a.). *See infra* at 25-26. But under the rule Petitioner would have this

Court adopt for cases other than this one – cases in which an illegitimate child has *not* alerted the putative father, who is also the testator, before his death – the father is deprived of his opportunity to distribute his property upon death in the manner he desires. In essentially requiring any child with an interest in estate recovery to come forward with a claim of paternity during the life of the father, Oklahoma's statutory scheme vindicates the father's right to organize the disposition of his assets upon his death as he sees fit. *Cf. Trimble*, 430 U.S. at 774 n.16 (distinguishing the issue of intestate succession from the specific intent expressed by a testator in disposing of his estate).

3. Petitioner's argument for overruling *Lalli* on the basis of subsequent developments in DNA testing overlooks all of these state interests, none of which has anything to do with problems of proof in the establishment of paternity. But even the merits of Petitioner's ultimately quite narrow fact-based argument for overruling *Lalli* – that DNA testing is now so nearly perfect and foolproof that it may safely be imposed by judicial fiat on the rules states otherwise choose to adopt for the establishment of paternity in estate proceedings – are not so incontestable that a federal constitutional rule ought to immediately supersede the considered judgments of the state legislatures in this area.

The simple point, recognized in *Lalli*, 439 U.S. at 526, is that requiring that paternity be determined during the lifetime of the putative father still *enhances* the fact-finding process. No one contends that genetic testing is

100% conclusive;[8] indeed, under our judicial system genetic testing can be, at the very best, only an evidentiary means of proving an ultimate fact. Jean E. Maess, Annotation, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R.4th 167 (1985) (collecting cases at Section 5). The presence of the putative father in that fact-finding process remains, in short, critical to the judicially-authoritative assessment of paternity – as evidenced most clearly by the many reported cases in which factfinders necessarily *reject* seemingly conclusive DNA evidence.[9]

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[8] Indeed, genetic testing is subject to many disputes, including (i) reliability of the testing process; (ii) the lack of exhaustive peer scrutiny due to the small forensic scientific community; (iii) population grouping; and (iv) the issue of band shifting. *See* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 La. L. Rev. 379 (1997); Richard A. Nakashima, *DNA Evidence in Criminal Trials: A Defense Attorney's Primer*, 74 Neb. L. Rev. 444 (1995); Allan Sincox & Marijane Hemza-Placek, *Challenging the Admissibility of DNA Testing*, 83 Ill. B.J. 170 (1995); Jonathan J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 Jurimetrics J. 21 (Fall 1993).

As one state court frankly admitted,

> As is often the case, percentages and statistics used by scientists are baffling to the legal profession. We admit to being somewhat befuddled by the scientific nature of this record, the scientific shorthand and the various probability figures which seem contradictory.

Johnson v. Gant, 516 So. 2d 1275, 1276 (La. Ct. App. 1987).

[9] In a substantial number of cases, the fact-finder has rejected seemingly-conclusive DNA results in favor of the father's denial of paternity. *See, e.g., Suire v. Robison*, 511 So.2d 35, 36 (La. Ct. App. 1987) (rejected DNA result of 97.28%

Requiring a post-death paternity proceeding would, in many cases, transform the genetic evidence into just that kind of conclusive effect,[10] depriving the putative father of the opportunity to organize his own estate, *see supra* at 18-19, and to defend his reputation and good name. *Lalli*, 439 U.S. at 271; *Pryor v. Jump*, 83 P.2d 828 (Okla. 1938).

4. Finally, Petitioner's proposed constitutional rule would also raise at least one virtually intractable problem of judicial administration: defining the logical stopping

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probability); *State v. Hogan*, 613 So.2d 681, 682 (La. Ct. App. 1993) (rejected 99.99% probability of parenthood); *State v. Hagen*, 382 N.W.2d 556, 559 (Minn. Ct. App. 1986) (rejected 99.62% probability); *Chisolm v. Eakes*, 573 So.2d 764, 765 (Miss. 1990) (rejected 99.59649% probability); *In the Matter of Denise H.*, 522 N.Y.S.2d 920 (App. Div. 1987) (rejected results of HLA test); *In the Matter of Kathleen "EE"*, 490 N.Y.S.2d 627 (App. Div. 1985) (rejected 98.1% probability); *Smith v. Shaffer*, 515 A.2d 527, 527-28 (Pa. 1986) (rejected 99.99% probability). *See also Campbell v. Apfel*, 177 F.3d 890, 891 (9th Cir. 1999) (noting that in related state child support proceeding, a genetic test determined that there existed a 98.14% probability that Schmidt was the father, but Schmidt denied paternity and the California state court denied the child's request for temporary child support).

[10] The facts of this case are a perfect example: the Petitioner was conceived over 40 years ago, the putative father is long since dead, and any non-DNA evidentiary trail has gone completely cold. As Justice Jackson observed in another context, permitting this case to go forward would allow the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-89 (1944). While a legislature might reach the result Petitioner advocates, there is certainly no constitutional compulsion to require such an ancient claim to be advanced.

point of DNA proof of paternity in estate proceedings. This case itself involves not the estate of the putative father, but rather the estate of his mother – Petitioner's putative *grandmother*. Presumably, Petitioner does not mean to contend that the descendants of Thomas Jefferson and Sally Hemings have a federal constitutional right to intercede in an estate proceeding involving the previously acknowledged heirs of Jefferson, but there is nothing in either the Constitution itself or the Court's cases immediately suggesting where a line between cognizable and noncognizable claims of alleged illegitimate children could be drawn. The real point, however, is that it is the states, and not the federal judiciary, that have traditionally made just these kinds of decisions in regard to the disposition of property upon death. The elected representatives of the people of Oklahoma chose to draw their "line" at the establishment of paternity in one of several ways before the death of the father, and there is no basis in law or fact for invalidating that choice.[11]

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[11] Petitioner timidly advances one alternative – the use of a claims procedure (Pet. at 16 n.4) – but, even aside from the dubious constitutional source for such a procedure, that suggestion concedes the point made in the text: Petitioner's constitutional rule would invite not finality but an escalating round of constitutional litigation over, among other items, (i) the adequacy of the notice provided; (ii) the minimum time period constitutionally required to assert claims; (iii) the adequacy of the search for possible offspring and (iv) issues of retroactivity. Petitioner would therefore substitute uncertainty and rounds of litigation for the clear and unambiguous rule approved in *Lalli* and adopted by the Oklahoma legislature.

II. THIS CASE IS UNIQUE AND WOULD NOT MAKE A SUITABLE VEHICLE FOR REVIEWING THE COURT'S DECISIONS IN THIS AREA

Apart from the two reasons Petitioner advances for overruling established precedent in *Lalli*, Petitioner says almost nothing at all about the suitability of this case in particular as a platform for launching this new constitutional assault. Yet the instant case is an unsuitable vehicle for reexamining *Lalli* for reasons unrelated to any question of constitutional law. Even if the problems of proof were the only relevant consideration in the Court's approval of the requirement of a "before death" paternity determination in *Lalli*, and even if advances in technology and DNA testing have rendered that consideration irrelevant – neither of which Respondents believe to be true – the Court should decline to grant certiorari in this case because the decision of the Oklahoma Court of Civil Appeals was correct on independent state law grounds. Although these grounds were addressed by the parties below, they were not ruled on by the lower courts because of the threshold determination that Petitioner lacked standing under Oklahoma law to contest Mrs. Geller's Will. Nevertheless, these grounds would be dispositive against Petitioner on any remand. Granting certiorari in this case would therefore be a waste of scarce judicial resources resulting in, at most, an advisory opinion that would not grant the Petitioner any relief.

A. Petitioner Is Time-Barred From Initiating A Paternity Action Regardless Of Whether Oklahoma Law Allows A Post-Death Paternity Determination

Petitioner notes that "[m]ost if not all 50 states, prodded by Congress, now give children 18 or more years to establish paternity against living fathers obligated to pay child support" (Pet. at 9.). Oklahoma law is in accord, and Okla. Stat. tit. 70, § 70(D) (1998 Supp.) allows an illegitimate child 19 years to commence a paternity proceeding. Under Section 70(D), Petitioner's right to initiate a paternity proceeding against Jay Myers expired on her nineteenth birthday.

The record reflects that Petitioner did not even learn of Jay Myers' existence until she was over 30 years old. *See supra* at 2. Thus, even if Petitioner were correct in asserting that the Constitution requires that an illegitimate child be allowed the same time period to "judicially determine" paternity for inheritance purposes, when the putative father is deceased, as such child has to bring a paternity action to obtain child support against a living father, Petitioner's claim is still time-barred. Oklahoma's statute of limitations governing paternity actions flatly forbids an illegitimate child from *commencing* a paternity proceeding when that child is 40 years old, as Petitioner seeks, and nothing in the *Mills*, *Pickett*, and *Clark* trilogy suggests that such a statute of limitations is constitutionally impermissible.

Nor is there any provision in Oklahoma law for extending the time to bring a paternity action merely

because the mother of the illegitimate child did not disclose to the child the identity of her putative father until the child was 30 years old. There is no "discovery" provision in Okla. Stat. tit. 10, § 70(D). The statute plainly and unequivocally states that a paternity action shall be available to a child "if commenced within one (1) year after the child reaches the age of eighteen (18)." On the child's nineteenth birthday, Oklahoma law bars the initiation of a paternity action, regardless of whether such action is initiated for support, inheritance, or other purposes, and regardless of whether the putative father is living or deceased. Because the decision of the Oklahoma Court of Civil Appeals was correct on this alternative state law ground, this Court should not grant certiorari to issue an advisory opinion that will grant Petitioner no relief.

B. Mrs. Geller Disinherited Petitioner In Her Will

It is undisputed that Mrs. Geller executed her Last Will and Testament *after* Petitioner had contacted her claiming to be Mrs. Geller's born-out-of-wedlock granddaughter. In anticipation of Petitioner asserting a claim against her estate, Mrs. Geller expressly directed Mr. Fist to insert a forced heirship clause into her Will, which specifically bequeathed one dollar ($1.00) to any person not mentioned in the Will "who would inherit a portion of my estate had I not executed this Will."

Oklahoma's "pretermitted heir" statute, Okla. Stat. tit. 84, § 132, generally provides that when a testator unintentionally omits a grandchild in Petitioner's alleged position, that grandchild must inherit as if the testator had died intestate. In *Estate of Woodward*, 807 P.2d 262

(Okla. 1991), the Oklahoma Supreme Court "adopt[ed]" the view taken by the California Supreme Court of "a pretermitted heir statute which is similar to Oklahoma's," *id.* at 264, in a case in which the California court had held that general language of disinheritance would be operative against an heir who was not specifically mentioned in the will, so long as the testator refers to an identifiable, interested class to which the putative heir belongs, *see id.* (citing *Estate of Gardner*, 580 P.2d 684 (Cal. 1978)).[12] And in the California case followed in *Woodward*, the California Supreme Court specifically observed that the phrase *"those who would take if I died intestate"* is just such a description. *Gardner*, 580 P.2d at 685.

That language is almost identical to the actual words used by Mrs. Geller in her forced heirship clause, and is wholly indistinguishable in intent, meaning, and effect. It is therefore perfectly clear that Petitioner has, in all events, no viable claim for recovery from Mrs. Geller's estate under Oklahoma law. Should the Court take this case to revisit *Lalli* and strike down § 215, that action would be irrelevant to the ultimate disposition of Petitioner's claims.

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[12] *See also Spaniard v. Tantom*, 267 P. 623, 625 (Okla. 1928) ("Our statute being identical with the California statute the construction placed thereupon by the California Supreme Court is very persuasive."); *Estate of Kane*, 828 P.2d 997, 999 (Okla. Ct. App. 1992) (citing and following 1890 California Supreme Court decision construing California's pretermitted heir statute because said statute "was almost identical to [Okla. Stat. tit. 84, § 132]").

CONCLUSION

As this Court has frequently observed, the purpose of certiorari is not to settle the private issues between the parties, but to resolve issues of fundamental importance. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). As noted throughout this response, (i) no decision of this Court has questioned or undermined the continued vitality of *Lalli*; (ii) the policy reasons underlying *Lalli* are markedly different from those asserted in the child support cases on which Petitioner relies; and (iii) the unique facts render this case unsuited for a re-examination of *Lalli*. For all these reasons, *Lalli* remains good law and should not be overruled.

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RESPONDENTS' APPENDIX A

Okla. Stat. tit. 10, § 70 (1998 Supp.)

**Presumption of maternity –
Proceedings to Establish Paternity**

A. Except as otherwise provided by law, a woman who gives birth to a child is the natural mother of the child.

B. Paternity may be established by:

1. A notarized written statement of the father and mother acknowledging paternity pursuant to Section 1-311.3 of Title 63 of the Oklahoma Statutes. A statement acknowledging paternity shall have the same legal effect as an order of paternity entered in a court or administrative proceeding.

a. The statement may be rescinded by the mother or acknowledging father within sixty (60) days after the statement is signed by filing a signed rescission of affidavit acknowledging paternity form with the Office of the State Registrar of Vital Statistics.

b. If the mother was married at the time of conception or birth, and her husband is not the natural father of the child, and the time to dispute paternity pursuant to Section 3 of this title has not expired, the husband may sign a husband's denial of paternity form, which must be filed along with the affidavit acknowledging paternity.

c. The rescission of affidavit acknowledging paternity and the husband's denial of paternity forms shall be prescribed by the Department of Human Services and made available at the same locations as the affidavit

acknowledging paternity provided for in Section 1-311.3 of Title 63 of the Oklahoma Statutes.

2. Scientifically reliable genetic tests, including but not limited to blood tests;

3. District or administrative court order; or

4. As otherwise provided by law.

C. Proceedings to establish paternity may be brought in the appropriate district court or through the Department of Human Services, Office of Administrative Hearing: Child Support. Proceedings may be brought by the mother, father, guardian, or custodian of the child, the Department of Human Services, the district attorney, a public or private agency or authority chargeable with the support of the child, or by the child. The court, after determining paternity in a civil action, shall enter an order providing for the support and maintenance of the child. The social security numbers of both parents and the child shall be included on the child support order summary form provided for in Section 120 of Title 43 of the Oklahoma Statutes which shall be filed with all orders establishing paternity. The district court may further make provision for custody and visitation based upon the best interests of the child.

D. An action to establish paternity shall be available to a child if commenced within one (1) year after the child reaches the age of eighteen (18).

RESPONDENTS' APPENDIX B

Okla. Stat. tit. 84, § 132 (1991)

Provision for children unintentionally omitted

When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

Supreme Court, U.S.
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(3)

No. 99-1

IN THE

Supreme Court of the United States

HOLLY WHITE,

Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN, and LORI ANNE CHOZEN,

Respondents.

On Petition For Writ of Certiorari to the Oklahoma Court of Appeals

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REPLY BRIEF FOR PETITIONER

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HOLLY WHITE,

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DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN, and LORI ANNE CHOZEN,

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On Petition For Writ of Certiorari to the Oklahoma Court of Appeals

REPLY BRIEF FOR PETITIONER

Respondents, in their brief in opposition, have offered no persuasive argument for denying a writ of certiorari. The Court's ruling in *Lalli v. Lalli*, 439 U.S. 259 (1978) -- holding that it is constitutional to bar an illegitimate from seeking inheritance by intestate succession if she did not establish paternity before the father's death -- plainly needs reexamination, and this case is a good vehicle for doing so.

I. RESPONDENTS OFFER NO PERSUASIVE ARGUMENT SUPPORTING THE CONTINUED VALIDITY OF *LALLI*.

A. Respondents Have Failed to Articulate Any State Interest Justifying the Onerous Rule Applied Here to Penalize Petitioner.

The weakness of respondents' arguments against review becomes most telling when they try to identify a state interest that justifies a flat ban on assertion of paternity claims in estate proceedings where, as here, paternity was not established prior to the putative father's death. Respondents recognize a need to articulate some interest unrelated to the "problems of proof" of paternity after death -- problems that were the key to this Court's reasoning in *Lalli* but have now faded to insignificance in light of the availability of DNA testing. But their efforts to describe some additional state interest are unavailing.

It does no good, first of all, merely to repeat the phrase "orderly disposition of assets" as if it were self-evident that allowing claims like petitioner's would cause substantial disorder in estate proceedings. Precisely because problems of proof have been dramatically ameliorated, there is no reason to assume that undue disruption will ensue merely because one of the claimants in a proceeding is an illegitimate bearing the burden of proving paternity.

Nor is it enough to assert that Jews and others may dislike the exhumations that are often required to allow DNA testing. Even if *Lalli* were overruled, the state courts would retain the right to decide in a given case whether an exhumation is justified. In some cases, they would have the option of relying on DNA testing of living relatives. *See* Pet. 15. In others, they might choose to require a sufficient showing of

extrinsic evidence of paternity before ordering exhumation. But the fact that such judgments must be made does not justify a flat rule against posthumous claims, applicable even in a case like this one where the rule operates to deny a person a fair opportunity to assert and protect her rights.

Respondents are equally unpersuasive in defending *Lalli* as vindicating a state interest in "allowing their residents to decide for themselves the distribution of their property." Br. in Opp. at 18. The issue here is whether states can arbitrarily cut off illegitimates' (but not legitimates') right to inherit by intestate secession, where residents have *not* made those decisions. Under Oklahoma law, testators, such as Mrs. Geller, have the right to dispose of their property as they so desire and they may effectively disinherit those whom they desire. Fathers and grandmothers who have unknown (or known) children are able to express their intent regarding inheritance by any potential illegitimate child in a will, which would preclude an inheritance claim. In the present case, however, neither Mrs. Geller nor the putative father executed any instrument evidencing the requisite intent to disinherit petitioner, even though they both knew petitioner existed and knew of her potential heirship claim. *See* p. 7 *infra*. None of the constitutional arguments advanced by petitioner herein alters or affects an individual's right to decide for himself the distribution of his property.

When all is said and done, *Lalli* did rest on the proposition that paternity was hard to prove after the death of a putative father, and that such efforts would accordingly disrupt estate proceedings. Those intuitions simply are no longer valid, and the constitutional calculus needs to be changed.

B. The *Lalli* Rule is in Tension With the *Mill-Pickett-Clark* Trilogy.

Respondents are no more persuasive when attempting to minimize the significance of legal developments since *Lalli*. They claim that there is no relation between the constitutional issue presented here and the constitutional issue presented in *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988). But the latter line of cases cannot be ignored so easily. The Court there held that the states' interest in avoiding stale paternity claims was outweighed by the interest of illegitimate children in proving paternity and obtaining support. It invalidated even a six-year statute of limitation as erecting an undue barrier. Here, the question is whether any state interest that remains applicable in light of current technology justifies a state in erecting an insurmountable barrier to pursuit of inheritance claims whenever a putative father dies before the child has had the opportunity to prove a paternity claim. That question cannot be answered without reference to the *Mills-Pickett-Clark* trilogy.

Respondents themselves characterize the trilogy as cases applying the "unexceptional principle . . . that where a state decides to create a judicially enforceable right of a child to receive benefits from a father, there is no plausible state interest in excluding illegitimate children from the receipt of such benefits." Br. in Opp. at 12. What they do not explain is why the same principle should not be applied here as well. In the present case, petitioner seeks to enforce an undisputed right to inheritance by and through her putative father. What the State has done, however, is to make that right effectively meaningless for one class of illegitimates. That requires a very compelling justification.

Certainly it cannot be suggested that the statutory benefits of child support addressed in the *Mills-Pickett-Clark* trilogy are inherently more fundamental than inheritance rights. Both are obviously very important in particular cases. Indeed, for a child like petitioner whose father died soon after her birth, inheritance rights may be all-important.

Finally, respondents repeatedly quote one sentence from *Reed v. Campbell*, 476 U.S. 852 (1986), suggesting that the Court there implicitly reaffirmed *Lalli*. Br. in Opp. at 7, 13. But the only issue in *Reed* was whether a state could constitutionally refuse to enforce retroactively the right of an illegitimate to claim intestate inheritance, established in *Trimble v. Gordon*, 430 U.S. 762 (1977). The Court ruled *against* the state, emphasizing that any differential treatment of illegitimates in laws governing inheritance must "have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death." 476 U.S. at 855. For the reasons we have stated, a rule flatly barring all posthumous paternity claims, although perhaps once justified as serving that state interest, no longer can be so justified.

C. Respondents Do Not and Cannot Make the Advances in DNA Testing Disappear.

Respondents' attacks on the reliability of DNA testing itself, Br. in Opp. at 19-21, are utterly unpersuasive. Such testing is routinely used in judicial matters and has vastly increased the accuracy of efforts to determine paternity. Indeed, respondents do not claim otherwise.

Nor does it make sense to suggest that claims based on DNA testing have no "logical stopping point." Br. in Opp. at 21-22. The stopping point depends on state law. If a legitimate

could inherit in a given situation, an illegitimate able to prove paternity should not arbitrarily be denied the same right. Thus, here, under Okla. Stat. tit. 84, § 132, a pretermitted heir who is "the issue of any deceased child," i.e., a grandchild, is entitled to share in a testator's estate. Similarly, under Okla. Stat. tit. 84, § 215, a grandchild is allowed to inherit from the father "and his kindred." The "logical stopping point" is at the grandchild level.

Oklahoma law also establishes one further "stopping point": assuming adequate notice has been given to potential claimants, a final decree and distribution in a given probate estate operates as a bar to any claims against that estate. *See* Okla. Stat. tit. 58, § 632. Here, however, the probate proceeding had just commenced when the petitioner asserted her claims. There was no final decree and distribution order that could have effectively barred petitioner's pretermitted heirship claims. She simply was not allowed to pursue her claims, because she had never had an opportunity to establish paternity during her father's lifetime.

In sum, respondents have offered no substantial response to petitioner's constitutional arguments, and no reason why *Lalli* should be left on the books. This Court frequently cautions lower courts against anticipating the demise of the Court's prior rulings. In so doing, the Court takes on the responsibility to scrutinize cases that appear to have become outmoded in the extreme. This is just such a situation.

II. RESPONDENTS' ARGUMENTS BASED ON DEFENSES NOT ADJUDICATED BELOW ARE BOTH IRRELEVANT AND WRONG.

Respondents fall back on the shopworn tactic of presenting this Court with state-law arguments they would

assert on remand in the event the Court were to rule for petitioner. But such arguments, of course, provide no basis for denying review. The question presented here is an important one, regardless of whatever additional defenses respondents think they have available to them.

In any event, respondents are wrong. First, they argue that petitioner's claim is time-barred under the 19-year statute of limitations for paternity claims. But that statute applies only to actions to establish paternity -- not to claims seeking part of an estate. Moreover, if the statute did operate to cut off petitioner's claims here, it would be just as unconstitutional as the inheritance statute challenged here. When an illegitimate child's father dies during her infancy, she has no opportunity to file a paternity action. If the next opportunity to assert paternity is in an estate proceeding 30 years later, treating that claim as time-barred is functionally the same, and just as unfair, as cutting it off the day the father died. In any event, respondents never raised this purported statute of limitations defense in the courts below.

Similarly, the claim that Mrs. Geller barred this claim in her will is spurious. The provision of Mrs. Geller's will upon which respondents rely is commonly referred to as a "simple, general" no contest clause because it does not specifically identify an individual or any particular class of individuals sought to be disinherited. Under Oklahoma law, such a clause is not sufficient to bar a claim by a potential heir. In *In re the Estate of Woodward*, 807 P.2d 262 (Okla. 1991), the Oklahoma Supreme Court held that a will must contain "strong and convincing" language indicating an express intent to disinherit. *Id.* at 264. The Court reaffirmed the principle that a testator's intent to omit must be shown by at least

identifying the disinherited person by name or class.[1] *Woodward* was decided and published three months *before* Mrs. Geller's will was executed. She and her counsel were therefore on notice not only of petitioner's potential claim but also of the rule that a general disinheritance clause is not legally sufficient.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[1]Respondents rely on dictum in a California case -- *Estate of Gardner*, 580 P.2d 684 (Cal. 1978) -- suggesting that it may be enough for a will to state that there shall be no inheritance by "those who would take if I died intestate." *Id.* at 685 (internal quotation marks omitted). But whatever the law may be in California, *Woodward* makes clear that in Oklahoma it is not enough for a will to bar inheritance by "all other persons." Mrs. Geller's will used language that is functionally equivalent -- granting one dollar to "anyone" who would otherwise have a right to make a claim.